ANDRE RAVINDRAN S ARUL

v.

DULI YANG AMAT MULIA TUNKU IBRAHIM ISMAIL IBNI SULTAN ISKANDAR AL-HAJ

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S2-22-621-2001]
23 APRIL 2004

CIVIL PROCEDURE: *Writ of summons - Setting aside, application for - Grounds - Whether application for extension must be made before expiry of writ - Whether orders for extension of writ void ex debito justitae - Whether plaintiff had attempted to serve writ on defendant before it expired - Rules of the High Court 1980, O. 6 r. 7(2), (2A) - Interpretation Acts 1948 & 1967, ss. 23(1), 45*

STATUTORY INTERPRETATION: *Interpretation Act - Application to subordinate legislation - Order of precedence - Interpretation Acts 1948 & 1967, ss. 23(1), 45 - Rules of the High Court 1980, O. 6 r. 7(2A)*

This was an appeal by the plaintiff against the decision of the learned deputy registrar allowing the defendant's application to set aside: (i) two *ex parte* orders granted by this court to extend the writ of summons in this case; (ii) the writ of summons itself; and (iii) the service of the writ of summons. The defendant, in its application, had contended that: (a) the plaintiff's applications for extensions of the writ were made out of time *ie*, after the writ had expired, and that this ran contrary to O. 6 r. 7(2A) of the Rules of the High Court 1980 ('RHC') which demanded that such applications must be made before the expiry of the writ; (b) the extension orders for the writ were all void *ex debito justitae* since the commencement date for the extension began from a new date instead of continuing from the last date before the writ expired; and (c) since the plaintiff did not make any attempt to serve the writ on the defendant before it expired, he had contravened O. 6 r. 7(2) of the RHC which required that efforts be taken to serve the writ before making an application for an extension of the writ.

Held (allowing the plaintiff's appeal):

[1] Although O. 6 r. 7 (2A) of the RHC requires an application for an extension of a writ to be made before expiry of the writ, it runs contrary to s. 45 of the Interpretation Acts 1948 & 1967 ('IA'), which allows such an application to be made after the expiration of the prescribed time. Since s. 23(1) of the IA declares a subsidiary legislation (the RHC was made under such an enactment) containing inconsistent provisions to be void, s. 45 of the IA must prevail over O. 6 r. 7(2A) of the RHC. (p 229 g-h)

[2] The defendant's second ground of complaint was flawed because: (i) even though the date of issuance of the writ was 13 July 2001, this document was witnessed and signed by the senior assistant registrar on 14 July 2001. Thus, when the writ commenced on 14 July 2001, the expiry date fell on 13 January 2002, and the extension to commence from 14 January 2002 was in order since there was no break from the expiry date; and (ii) even if the expiry date of the writ was 12 January 2002, such an order for an extension would still not be void by reason that an application for extension could be made after the expiry date of the writ. (p 230 d-g)

[3] In this case, there was sufficient reason to justify the plaintiff's non-action in the service of the writ since the plaintiff withheld service so as to avoid duplicity of actions, and instead continued to extend the life of the writ until a preliminary issue of forum non conveniens in a parallel action commenced by the plaintiff against the defendant in the High Court of Singapore on the same subject matter was decided. Upon it being decided, the plaintiff served this writ on the defendant. There was good reason for the delay in the service of the writ; hence, there was no flaw in the extension orders of the writ. (p 231 d-f)

Case(s) referred to:
Battersby & Ors v. Anglo-American Oil Co Ltd & Ors [1945] 1 KB 23 ***(refd)***
Mayban Finance Bhd v. Umas Sdn Bhd & Anor [2002] 4 MLJ 276 ***(foll)***
The Goldean Mariner [1990] 2 Lloyd's Rep 215 ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, ss. 23(1), 45
Rules of the High Court 1980, O. 6 r. 7(2), (2A)

For the plaintiff - Jeffery Wong; M/s Jeffery Wong & Lim
For the defendant - Yusuf Khan (Mathew Thomas & Leney Albert); M/s Abdul Raman Saad & Assocs

Reported by Suresh Nathan

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JUDGMENT

James Foong J:

Introduction

Enclosure 29 is an appeal by the plaintiff against the decision of the learned b deputy registrar who allowed the defendant's application (in encl. 23) to set aside: (a) two *ex parte* orders granted by this court dated 26 March 2002 and 26 July 2002 respectively to extend the writ of summons in this case; (b) the writ of summons itself; and (c) the service of the writ of summons.

c **Background**

The plaintiff filed this suit claiming damages from the defendant in failing to pay consultancy services undertaken by the plaintiff to the defendant.

The writ of summons was filed on 13 July 2001 but the date inserted by the senior assistant registrar, who witnessed this document, is 14 July 2001.

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If one considers the date of issuance of the writ as 13 July 2001 then the six-month expiry date of this writ would be 12 January 2002. But if 14 July 2001 is accepted as the date of issuance then the writ would expire on 13 January 2002.

e There was no attempt to serve this writ on the defendant. On 24 January 2002, the plaintiff applied to extend this writ. It was allowed on 26 March 2002. The first extension (1st extension) order states that the writ is extended from 14 January 2002 to 13 July 2002.

f Despite this extension, no steps were taken by the plaintiff to serve the writ on the defendant. On 26 July 2002 the plaintiff made a second application to extend the writ. It was allowed and the writ was extended from 14 July 2002 to 13 January 2003.

On 10 January 2003 the writ was served on the defendant.

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Without haste the defendant filed conditional appearance and applied in encl. 23 to set aside the various orders, the writ, and the service of the writ as disclosed above. The deputy registrar, after hearing arguments allowed this application. Thus, this appeal.

h **Grounds Advanced By The Defendant In Support Of Enclosure 23**

1. The applications by the plaintiff for extension of the life of the writ were made out of time ie, after the writ has expired. This runs contrary to O. 6 r. 7(2A) of the Rules of High Court (RHC) which demands that such applications must be made before the expiry of the writ.

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2. The extension orders for the writ are all void *ex-debito justitae* since the commencement date for the extension begins from a new date rather than the continuation from the last date before the writ expired.

3. The plaintiff did not make any attempts to serve the writ on the defendant before it expired. This contradicts O. 6 r. 7(2) RHC that requires the plaintiff to make efforts to serve the writ before making an application for extension of the writ.

Analysis

1st Ground: Application For Extension Made Out Of Time

On the first ground challenging the plaintiff for making the applications for extension after the writ has expired thereby contravening O. 6 r. 7(2A) RHC, the plaintiff countered this with s. 45 of the Interpretation Acts 1948 & 1967 which provides:

> **Construction of power to extend time**
>
> Where in any written law a time is prescribed for doing any act or taking any proceedings and power is given to a court or other authority to extend that time, the power may be exercised by the court or authority although the application for its exercise is not made until after the expiration of the time.

Reading this together with s. 23(1) of the same Act:

> **Avoidance of subsidiary legislation in case of inconsistency with Act**
>
> Any subsidiary legislation which is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

the plaintiff contents that his application for extension of the writ can be made after expiry of the writ.

I agree with this proposition. Though O. 6 r. 7(2A) RHC requires application for such extension to be made before expiry of the writ, it runs contrary to s. 45 of the Interpretation Act that allows such application to be made after the expiration of the prescribed time. And since s. 23(1) of the Interpretation Act declares a subsidiary legislation (of which the RHC is made under such an enactment) containing an inconsistent provision to be void then s. 45 of the Interpretation Act must prevail over O. 6 r. 7(2A) RHC. With this, I find that the defendant's first contention cannot be sustained.

2nd Ground: Extension Orders Did Not Continue From The Expiry Date Of The Writ

The defendant's second ground of complaint is: the first extension order commenced from a date, which is a day after the expiry of the writ. According to the defendant's calculation the writ first expired on 12 January 2002. This is based on the commencement date at 13 July 2001. The first extension order states that the writ is extended to commence from 14 January 2001 to 13 July 2002. This leaves a gap of one day where the writ has expired. When the writ has expired then it cannot recommence on a date which is not immediately after the expiry date. It must start immediately after the expiry date of the writ otherwise there is a break in the life of the writ. Since there is such defect in the extension order, such order and the one made subsequently are void *ex-debito justitae.*

This argument is flawed in two aspects.

The first is the wrong perception that the date of the issuance of the writ is 13 July 2001. There is no dispute that this document was filed on 13 July 2001 but the date of issuance must follow the date when it was witnessed by the senior assistant registrar and signed by her as a representative of the Chief Judge who commands the defendant to enter appearance when the writ is served otherwise judgment will be entered against him. This is provided in Form 2 of the RHC. And the senior assistant registrar did this on 14 July 2001. Without the senior assistant registrar acting as a witness and signing on the writ, this document has no legal effect. Thus, the writ in my view is only effective from 14 July 2001 and not on 13 July 2001. When it commenced on 14 July 2001 then the expiry date fell on 13 January 2002 and the extension to commence from 14 January 2002 would be in order since there is no break from the expiry date.

Even if the expiry date of the writ is 12 January 2002 (by accepting the writ being issued on 13 July 2001) and the extension only commenced from 14 January 2002, such order for extension would still not be void by reason that an application for extension can be made after the expiry date of the writ. If it is made after the expiry date of the writ then the theory of the life of the writ must not extinguish at any one time is a fallacy since when such application is made the life of the writ has already expired. Thus if such extension is to commence it would still begin, in reality, from a date after the Writ had expired. If at all it is stated to commence immediately after the expiry date it would be a matter of backdating. Thus, I find that there is no necessity to state a date immediately following the expiry date of the writ. As long as the extended date is listed as to when it commences and terminates then the extension order is good, and in this case such endorsement exists.

3rd Ground: No Attempts Were Made By The Plaintiff To Serve The Writ To Qualify For Consideration For Extension

The third accusation levied on the plaintiff is that since the plaintiff made no attempts to serve this writ then he has failed to comply with the pre-requisite set out in O. 6 r. 7(2) RHC requiring the plaintiff to make efforts to serve this writ and such service has been unsuccessful before his application can be considered.

The principle applicable in respect of this issue is extensively considered by Justice Skinner in *Mayban Finance Bhd v. Umas Sdn Bhd & Anor*. [2002] 4 MLJ 276 at p. 287. I agree with the learned judge's view that the test to be applied for consideration for extension of the writ is "where the court is satisfied that good reasons appear to excuse the delay in service" (see Lord Goddard in *Battersby & Ors v. Anglo-American Oil Co Ltd & Ors* [1945] 1 KB 23 at p. 32) rather than basing it on the mere fact that there is no attempt to serve the writ before the application for extension is made.

In this case I find there is sufficient reason to justify the plaintiff's non-action in the service of the writ. There was a parallel action commenced in the Singapore High Court by the plaintiff against the defendant on the same subject matter. But the defendant had raised a preliminary issue of forum non-conveniens. While the Singapore courts were considering this matter, the plaintiff filed this action as a protective writ, to preserve the plaintiff's cause of action in the event the Singapore courts rule in favour of the defendant and requires the plaintiff to litigate in Malaysia. The filing of such protective writ is allowed by law – see *The Goldean Mariner* [1990] 2 Lloyd's Rep 215 at p. 219. For this reason the plaintiff withheld service so as to avoid duplicity of action, and, instead, continued to extend the life of the writ until the Singapore Court of Appeal decided against him on the issue mentioned. Once that was decided, the plaintiff served this writ on the defendant. This, I consider as good reason for the delay in the service of the writ leading to there being no flaw in the extension orders of the writ.

Conclusion

Accordingly, I hereby allow this appeal with cost in the cause.